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Comments on the Proposed Final Judgment
in United States v. Microsoft

by Robert Thrun

I have downloaded and read both the Proposed Final Judgment and the Competitive Impact Statement. I am speaking for myself and not for my employer.

The Proposed Final Judgment seems to be an agreement by Microsoft to cease its illegal exclusionary tactics and do what it should have been doing all along. There is no punishment for past behavior or any "affirmative action" to re-establish competition. Even so, there are many loopholes that Microsoft can use to continue exclusionary tactics to maintain and extend its monopoly. The Competitive Impact Statement concentrates on Middleware and says nothing about other tactics that Microsoft uses.

Breakup

The Court of Appeals did not entirely rule out a breakup of Microsoft, but the Department of Justice abandoned the idea. I maintain that the best solution would be a breakup. Other solutions would involve micromanagement by either the courts or a government agency. I would break Microsoft into four parts:

1. Operating systems
2. Development tools, such as compilers
3. Application programs, such as Word and Excel
4. MSN, the Microsoft Network

The compilers must be able to access the operating system functions. The Microsoft compilers have an advantage in that the operating system documentation assumes the use of Microsoft compilers, and the Microsoft compiler writers find out about operating system features before any writers of competitive compilers.

The Microsoft application writers can request operating system support for features they want to put into the applications and they find out about the operating system features before the writers of other application programs.

Internet Explorer and Outlook keep wanting to connect to MSN and use it. This is a great marketing advantage.

Definitions

The Competitive Impact Statement is poorly written. The Competitive Impact Statement refers to "definitions contained in the Proposed Final Judgment", but the definitions are in the Competitive Impact Statement, not the Proposed Final Judgment. The definitions are complex, vague, and written to show where Microsoft does not have to disclose information.

Under the terms of the Competitive Impact Statement, Microsoft seems to still be able to define what is Middleware and what is part of the operating system. Microsoft was able to claim that Internet Explorer was an essential, non-removable, part of Windows by simply moving five essential files into the Internet Explorer subdirectory.

Microsoft claims to distinguish a new "major version" of Microsoft Middleware from an upgrade by its product numbering

scheme. Then all Microsoft has to do to avoid releasing API details for a new Middleware version under section III.D of the Proposed Final Judgment is to change its numbering scheme.

The Competitive Impact Statement says that Microsoft does not have to disclose API details to any company that has not sold at least a million copies of a similar Middleware Product in the previous year. This would exclude startup companies and established companies wishing to expand their product line.

Prohibited Practice Issues

Microsoft cannot retaliate against an OEM in a logo or software certification program. However, the biggest use of such a program applied to application program vendors at the introduction of Windows 95. Windows 95 will run applications written for the older Windows 3.1. Applications could not use the Windows logo in their packaging or advertising to state that they would run under Windows 95 unless they were written in such a way that they would not run under Windows 3.1. This was a use of monopoly power that effectively killed some emulators that would have allowed Windows software to run under other operating systems.

The uniform license agreements described in Section III.B of the Proposed Final Judgment apply only to Microsoft's top 20 customers. They should apply to all OEM customers. The smaller OEMs are more likely to offer custom configurations of the operating system.

API Disclosures

The section of the Competitive Impact Statement relating to Section III.D of the Proposed Final Judgment seems to say that Microsoft should release documentation about operating system APIs in much the same way it is currently being done. However, the Competitive Impact Statement has a couple of loopholes in its definition of "Timely Manner". For operating system APIs, documentation must be made available when a beta test version of the operating is released with a distribution of at least 150,000. What if only 140,000 copies are released? For Microsoft Middleware, the documentation must be released at the time of the final beta test version. Microsoft could release a beta just before the release of its product. Either way, this would allow time for the Microsoft products to become entrenched in the market.

Communications Protocols

Under the section of the Competitive Impact Statement entitled "Microsoft Must Make Available All Communications Protocols" is is specifically stated that Microsoft does not have to disclose server-server protocols! I don't know what, but it seems obvious that Microsoft has some trickery in mind with this provision.

Preservation of OEM Defaults

A provision of the Competitive Impact Statement allows Microsoft to "override existing defaults" when accessing a server maintained by Microsoft. This translates to a requirement for using Internet Explorer. Microsoft has already done this by blocking competitive browsers from downloading

upgrades from its servers. Microsoft should not be allowed to do this.

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Microsoft is allowed to avoid disclosing information for several security-related reasons. Withholding information about protocols and interfaces may slow down an attack, but it does not increase the actual security of a system. The vulnerability is still there. If Microsoft is allowed to define what is security-related, it will be another large loophole.

What Should be Done

For starters, all information about all APIs and all protocols must be made available to all interested parties. This should be done well before Microsoft ships to OEMs or sells at retail any operating system, Middleware, or application that either provides or uses the API or protocol. Three months seems like a reasonable minimum time. Ideally, the Microsoft programmers should not have access to insider information about the operating system. There should be no secret calls or protocols. Microsoft has to document the APIs and protocols anyway before they are used by its internal programmers.

The browser war is over. Microsoft won and I can think of nothing that will resurrect Netscape. Many of the issues that were brought up in the lawsuit are now moot. However, Microsoft is still engaged in anticompetitive practices that should be restrained. As I said before, a breakup would be the cleanest solution. Since this is unlikely, there are other restrictions that should be put in place.

Much of the software battle has shifted over to file formats. Many people use Windows because they have to exchange files with users of Word, Power Point, or other Microsoft programs. Since the formats are undocumented, non-Microsoft programs or file converters have to guess at the details. Microsoft enjoys a monopoly or near-monopoly position in most of the application categories in which it competes. Some of the file formats, like the WMF and EMF graphics files, are operating system file formats. All Microsoft file formats should be disclosed.

A simple requirement that Microsoft disclose all interfaces, calls, protocols, and file formats would make unnecessary many of the definitions in the Competitive Impact Statement, eliminate loopholes, and make the settlement easier to understand.

Microsoft has, by its monopoly position in operating system software, the ability to put almost any software product out of business by bundling a similar Microsoft product for "free" with the operating system. The Microsoft product is not actually free. The computer user pays for it as part of the price of the operating system. Microsoft has put many products off the market. Some, like memory managers or disk cache programs, provided services that are rightly part of an operating system. Others, like the browser, seem more like a application program. There was considerable innovation in all these product categories until Microsoft achieved dominance and very little since then.

The Microsoft product that is included with the operating system has great competitive advantages. The non-Microsoft product has some cost versus no additional cost for the

Microsoft product. Even if an OEM were to remove the Microsoft product from the installation, Microsoft is still paid for it. Being packaged in the default operating system installation means that the Microsoft product, in effect, sits on the shelf in front of the non-Microsoft product. Unless the Microsoft product performs very poorly, the market for the non-Microsoft product is very small.

Microsoft is now including audio player and file compression software with its operating systems. The only way to keep Microsoft from driving all other similar products off the market is to require Microsoft to reduce the price of the operating system to the OEM if the OEM chooses to replace some Microsoft product that is bundled with the operating system. Similarly, there should be retail versions of the most popular stripped-down configurations. This will give consumers the option the option to not buy Microsoft products they do not want. Microsoft will still have a strong competitive position by virtue of name recognition.